

216972

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Attorney at Law

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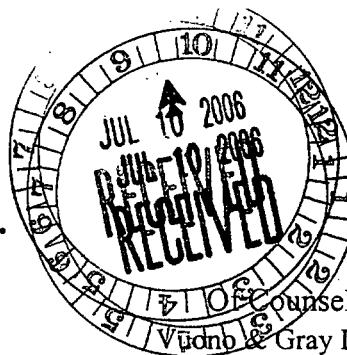
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851 Twelfth Street
Oakmont, PA 15139



Counsel to:
Vernon & Gray LLC

2310 Grant Building
Pittsburgh, PA 15219
(412) 471-1800
(412) 471-4477 FAX

July 6, 2006

Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

SENT VIA FACSIMILE AND
U.S. MAIL

Re: Petition of Honey Creek Railroad, Inc. for Declaratory Order
Finance Docket No. 34869; Reply of Honey Creek Railroad, Inc. to the Roberts
Supplemental Petition for Further Extension of Time

Dear Sir:

Transmitted herewith for filing in the above captioned proceeding, please find the original and ten copies of Honey Creek Railroad, Inc.- Petition for Declaratory Order - Reply of Honey Creek Railroad, Inc. to the Roberts Supplemental Petition for Further Extension of Time. A hard copy of this Reply is also being sent via U.S. Mail.

Please time stamp the additional copy of this letter and return it to the undersigned in the enclosed self addressed, stamped envelope. Copies of this Petition have been served on all parties of record.

Very truly yours,

RICHARD R. WILSON, P.C.

Richard R. Wilson, Esq.

Attorney for Honey Creek Railroad Company

ENTERED
Office of Proceedings
JUL 10 2006
Part of
Public Record

RRW/bab

Enclosures

xc: Honey Creek Railroad, Inc.
All Parties of Record

216972

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO: 34869

HONEY CREEK RAILROAD, INC. -
PETITION FOR DECLARATORY ORDER



**REPLY OF HONEY CREEK RAILROAD, INC. TO THE
ROBERTS SUPPLEMENTAL PETITION FOR FURTHER
EXTENSION OF TIME**

ENTERED
Office of Proceedings

JUL 10 2006

Part of
Public Record

RICHARD R. WILSON, ESQ.
Attorney for Honey Creek Railroad, Inc.
Pa. I.D. #25661
127 Lexington Avenue, Suite 100
Altoona, PA 16601
(814) 944-5302
(814) 944-6978 fax

Dated: July 6, 2006

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO: 34869

HONEY CREEK RAILROAD, INC.
PETITION FOR DECLARATORY ORDER



**REPLY OF HONEY CREEK RAILROAD, INC. TO THE
ROBERTS SUPPLEMENTAL PETITION FOR FURTHER
EXTENSION OF TIME**

Honey Creek Railroad Company, Inc. ("HCR"), files this Reply to the Roberts Supplemental Petition for Further Extension of Time dated June 30, 2006. Roberts filed its prior Supplemental Petition for Further Extension of Time on June 2, 2006 and by its Reply dated June 6, 2006 HRC indicated that it had no objection to affording new counsel the professional courtesy of a thirty day extension of time in which to file a substantive reply to HCR's Petition for Declaratory Order. However, HCR took strong exception to any further extension of time so that counsel could investigate facts and determine whether discovery would be requested before filing a reply. As noted in HCR's June 6 Reply, the matter now before the Board has been in litigation in Indiana Courts for over a year. The issue of referral to the Surface Transportation Board was before that Court for over six months before disposition. Respondent and his local counsel were therefore clearly on notice of the possibility that referral to the STB might occur and yet failed to take any action to obtain assistance of regulatory counsel until the Court granted referral and HCR filed its Petition for Declaratory Order with the Board. Thus, the delays in obtaining knowledgeable counsel and the time for responding to HCR's Petition for Declaratory Order were entirely of Respondent's own making. Moreover, Respondent's most recent attempt

of June 30, 2006 to seek further delay of the Board's consideration of HCR's Petition for Declaratory Order is unwarranted and meritless.

As justification for further delay and discovery, counsel for Respondent asserts that this case presents a question of whether a de facto abandonment occurred prior to HCR's 2004 request for abandonment authority or before the actions at issue in the underlying state proceeding occurred. However, these issues should have been pled and pursued in the state court proceeding by Respondent prior to referral to the Surface Transportation Board. The evidentiary record in the HCR abandonment proceeding has long been closed and the entire record in the HCR abandonment proceeding is available on the STB's website. Attempts by Respondent to seek discovery of facts related to a de facto abandonment indicate that Respondent intends to collaterally attack the authorization decision of the Board in the HCR abandonment proceeding. The appropriate time to raise these issues would have been in the HCR abandonment proceeding but Respondent did not do so.

In his court pleadings, Respondent did not assert that there was a de facto abandonment which occurred prior to the Board's 2004 abandonment authorization decision¹. Respondent asserted in the Henry County Circuit Court that subsequent to the STB's abandonment

¹ Respondent had a full and fair opportunity to frame the issues regarding his abandonment defense in the Henry County Circuit Court. Attached as Exhibit 1 is the amended complaint filed on behalf of Honey Creek Railroad, Inc. Attached as Exhibit 2 is Respondent's Answer to the Amended Complaint. Attached as Exhibit 3 is Defendant's Response to HCR's Petition for Order of Referral to the Surface Transportation Board. In that pleading, Roberts asserts in Paragraph 2 of the Introduction that he filed his answer, asserting that, due to HCR's abandonment of the railroad corridor and track materials any easement which may have been granted to HCR had reverted back to him as the adjacent land owner. This assertion was made notwithstanding the fact that a review of Defendant's answer to the amended complaint contains no reference whatsoever to an affirmative defense asserting HCR's de facto abandonment. Furthermore, in Section II Statement of Facts, Respondent asserts that "the combination of HCR's notice of exemption to abandon its entire line of railroad, coupled with its constructive consent to removal or paving over of other portions of track, comprise abandonment as a matter of law, or in the alternative, constructive abandonment thereby causing a vesting of the railroad's interest in Roberts, the owner of rights of way at issue here pursuant to I.C. §32-23-11-10. These factual allegations contained in Respondent's pleadings are unverified and unsupported by any affidavit on the part of Respondent. Furthermore, there are no factual allegations identifying the time periods within which such constructive abandonment is alleged to have taken place. Finally, Respondent affirmatively asserts and represents to the Henry County Circuit Court that the HCR's Notice of Exemption to abandon its entire line of railroad was an essential component to Respondent's claim of abandonment. Thus, Respondent has explicitly failed to assert in the Henry County Circuit Court any independent claim for de facto abandonment unrelated to HCR's Notice of Exemption to Abandon its entire line of railroad.

authorization order, the HCR line was abandoned and that the track and other personal property belonging to HCR became Respondent's property as a result of the STB's abandonment authorization order. Thus the legal issue on which Respondent's counsel seeks discovery was not raised by Respondent in the Circuit Court and therefore cannot be addressed by the Board in this proceeding. The Board, under the Court's referral order as set forth in HCR's Petition for Declaratory Order, is requested to address only the question which the Court referred to the STB.

Moreover, by letter dated June 10, 2005 local counsel for Respondent wrote to Mr. William Keaton, local counsel for HCR and stated "the Honey Creek Rail Line that crosses through my client's property was legally abandoned by the Surface Transportation Department of the United States Department of Transportation in August 2004. We have obtained the proper documentation from the Department of Transportation to verify the abandonment". The letter goes on to state "the Honey Creek Railroad has done nothing to operate its railroads for the past several years and there is no ability to operate the railroad in the future since it has been abandoned." (See Exhibit 4). Thus, Respondent has not asserted and did not rely in the Henry County Circuit Court on assertions of de facto abandonment unrelated to the Board's August 2004 decision.

The cases cited by Respondent are inapposite. In both Becker v. Surface Transportation Board, 132 F 3d 60 (D.C. Cir. 1979) and RLTD Ry. Corp. v. STB, 166 F 3d 808 (6th Cir. 1999) appeals were taken from decisions by the Surface Transportation Board by parties who had participated in the abandonment proceedings before the Board. Furthermore, the principle for which these cases are cited (i.e. determining whether a railroad has abandoned a line turns on the railroad's "objective intent" and that there is no rigid formula for determining intent) has been superceded by the December 24, 1996 promulgation of 49 C.F.R. §1152.29 (e)(2). That regulation was issued by the Board for the specific purpose of changing the subjective

determination of what constitutes consummation of an abandonment to an objective requirement that the abandoning carriers submit a notice of consummation to the Board within one year following the abandonment authorization order. Thus the Board, under its current regulations, no longer examines a broad spectrum of facts in each case to determine whether or not abandonment authorization has been consummated by a railroad.

In RLTD Railway Corp. v. STB several parties filed objections to the RLTD abandonment in the ICC abandonment proceeding claiming that the ICC had no jurisdiction over the stretch of track because it had been abandoned much earlier. In that decision, the STB ruled that it no longer had an authority over the RLTD line because the track had been abandoned when the predecessor of RLTD consummated an authorized abandonment of the line in the late 1970s. However, after being confronted with additional evidence indicating LTC had not consummated the authorized abandonment, the STB ruled there had been a de facto as well as a de jure abandonment of the line. The important point for purposes of the Roberts second Supplemental Petition for Further Extension of Time is that these factual findings and determinations by the Board in the RLTD case were presented to and made during the course of the RLTD abandonment proceeding before the Board.

Having failed to participate or to make objection regarding an alleged preexisting de facto abandonment by HRC in Docket No. AB-865X Honey Creek Railroad, Inc. – Abandonment Exemption – In Henry County, Indiana, Respondent is now precluded by the Hobbs Act from asserting a collateral attack on the HCR abandonment authorization decision by the Board. Under 28 U.S.C. §2342, only federal circuit courts of appeals have exclusive jurisdiction to “determine the validity of ... all rules, regulations or final orders of the STB may revealable by 28 U.S.C. §2321.” Accordingly, Respondent has no standing to assert a collateral attack on the factual record and determinations of the Board in the HCR abandonment proceeding.

The sole issue raised by Respondent in the Henry County Circuit Court is whether the STB's abandonment authorization order issued in STB Docket AB-865X was consummated so as to remove the rail line in question from the jurisdiction of the STB and subject it to the claims of Defendants under Indiana law. Moreover, the de facto abandonment issue is not even relevant under the provisions of Indiana law relied on by Respondent. Under I.C. §32-23-11-6 (a)(2), the Indiana statute regarding railroad abandonments states that after February 27, 1920 both of the following must occur in order for an abandonment to be recognized under Indiana state property law: (A) The STB issues a certificate of public convenience and necessity relieving the railroad of its common carrier obligation on the right of way and (B) rails, switches, ties, etc. are removed from the right of way making it unusable for continued rail traffic. This Indiana statutory provision relied on by Respondent explicitly incorporates compliance with federal regulatory abandonment procedures and the removal of rails, switches and ties sufficient to make the right of way unusable for continued rail traffic. Thus, the issue of a de facto abandonment is not statutorily recognized for purposes of Indiana state property law. Moreover, under I.C. §32-23-11-8(b) a railroad may discontinue rail service on a right-of-way without abandoning the right of way.

Under 49 C.F.R. §1114.21(a)(1), parties may obtain discovery in proceedings before the Board regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding. The subject matter of HCR's Petition for Declaratory Order has been defined by the pleadings of the parties in the Circuit Court of Henry County, the Court's referral order and the Indiana statutory sections pertaining to recognition of railroad abandonments under Indiana state property law. The issue of de facto abandonment is not implicated by any of those items. Accordingly, de facto abandonment is not a relevant topic for discovery in this proceeding and

Respondent's Petition for a further extension of time in order to undertake such discovery is without merit.

In conclusion, Respondent has complete access to the entire record in AB-865X and discovery is therefore unnecessary. By failing to participate in that abandonment proceeding and to seek judicial review thereof, Respondent is precluded by the Hobbs Act from asserting a collateral attack on the evidentiary record in AB-865X. Finally, by failing to assert claims of de facto abandonment prior to the 2004 STB abandonment authorization order in state court, Respondent has failed to plead and place those facts in issue before the Circuit Court. As a consequence, the issue of de facto abandonment has not been referred to the Board for resolution under the Court's referral order. Accordingly, Respondent's request for a further extension of time in which to conduct discovery regarding factual issues which are irrelevant and collateral to the matter before the Board is improper.

HCR therefore requests the Board deny Robert's June 30, 2006 Supplemental Petition for further extensions of time and direct Respondent to file a responsive pleading to the merits of HCR's Petition for Declaratory Order as directed by the Board's order of June 7, 2006.

Respectfully submitted,

RICHARD R. WILSON, P.C.

By:



Richard R. Wilson, Esq.
Attorney for Honey Creek Railroad, Inc.

RICHARD R. WILSON, P.C.
127 Lexington Avenue, Suite 100
Altoona, PA 16601
(814) 944-5302

STATE OF INDIANA,)
) SS: IN THE CIRCUIT/SUPERIOR COURT OF HENRY COUNTY
 COUNTY OF HENRY,)

NO. 33CO1-0506-CT-0019

HONEY CREEK RAILROAD, INC.,)
 an Indiana Corporation,)

Plaintiff,)

VS.)

GARY L. ROBERTS,)
 Individually,)

ROBERTS PIPELINE CONSTRUCTION)
 COMPANY, INC.,)
 An Indiana Corporation,)

ROBERTS CONSTRUCTION, INC.,)
 An Indiana Corporation,)

Defendants,)

FILED

JUN 27 2005

CB

(Signature)
 CLERK HENRY CIRCUIT COURT

AMENDED VERIFIED COMPLAINT

Comes now Honey Creek Railroad, Inc. (hereinafter referred to as "Honey Creek") by its President, William E. Smith, and for the Amended Verified Complaint of Honey Creek against Gary L. Roberts, individually (hereinafter referred to as "Roberts"), Roberts Pipeline Construction Company, Inc. an Indiana Corporation (herein after referred to as "Roberts Pipeline"), and Roberts Construction, Inc. (hereinafter referred to as "Roberts Construction") would show the Court as follows:

General Allegations

1. Honey Creek is a corporation organized pursuant to the laws of the State of Indiana.

2. Honey Creek is in good standing with the office of the Secretary of State of the State of Indiana.
3. Honey Creek is the owner of a railroad located in Henry County, Indiana, consisting of the right of use of certain property, a railroad bed, railroad ties, spikes, rails and switches (hereinafter referred to as "railroad").
4. Honey Creek has the sole right to the use and possession of the railroad.
5. Honey Creek is the owner of the personal property consisting of the rails, switches, spikes, ties and material making up the railroad bed.
6. Roberts Pipeline Construction Company, Inc. is an Indiana for-profit corporation with its principal office located at Sulphur Springs, Indiana.
7. Gary L. Roberts is the resident agent of Roberts Pipeline.
8. Roberts Construction, Inc. is an Indiana for-profit corporation with its principal office located at Sulphur Springs, Indiana.
9. Gary L. Roberts is the resident agent of Roberts Construction.
10. Gary L. Roberts is listed by the Indiana Secretary of State as the President and only principal of Roberts Pipeline and Roberts Construction.
11. Roberts and/or Roberts Construction and/or Roberts Pipeline are believed to own property adjoining the railroad in Henry County, Indiana.
12. Roberts, Roberts Pipeline and/or Roberts Construction have removed and destroyed rails, ties, spikes and severely damaged the railroad bed owned by Honey Creek.
13. Roberts, Roberts Pipeline and/or Roberts Construction have cut up and destroyed "number one relay rails" owned by Honey Creek, tremendously reducing their value from number one relay rail to scrap iron.
14. Roberts, Roberts Pipeline and/or Roberts Construction have cut up and destroyed a railroad switch owned by Honey Creek.

15. On June 16, 2005, trucks identified on the vehicles as Roberts Construction hauled away rails owned by Honey Creek.
16. Roberts, Roberts Pipeline and/or Roberts Construction continue to threaten to destroy additional property of Honey Creek.
17. Roberts, Roberts Pipeline and/or Roberts Construction have are believed to be in the process of and attempting to sell the property of Honey Creek.

I.

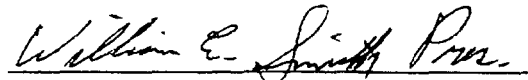
Request For Emergency Preliminary Injunction

Comes now Honey Creek Railroad, Inc. by its President, William E. Smith, and for its Complaint For Emergency Preliminary Injunction against Roberts, Roberts Pipeline and Roberts Construction would show as follows:

18. Honey Creek incorporates by reference rhetorical paragraphs 1 through 17 of the General Allegations as though fully set forth herein
19. An emergency preliminary injunction should be entered pursuant to Trial Rule 65(A)(1) enjoining Roberts, Roberts Pipeline and Roberts Construction from damaging any additional portions of the railroad and enjoining them from disposing of any of the property which they have removed from the railroad.
20. Roberts, Roberts Pipeline and Roberts Construction are represented by John H. Brooke, Esq., P. O. Box 1071, Muncie, Indiana 47308-1071, and a copy of this Amended Verified Complaint has been mailed to him to provide notice of our request for an emergency preliminary injunction.
21. Unless an immediate emergency hearing is held, irreparable injury, loss or damage will result to Honey Creek as the result of defendant's continued destruction of Honey Creek's railroad.

WHEREFORE, Honey Creek prays the Court to set this matter on an emergency basis for hearing on a preliminary injunction, to issue a preliminary injunction enjoining Roberts, Roberts Pipeline and Roberts Construction from continuing to destroy Honey Creek's property and from disposing of any property that has already been removed from the railroad pending a determination of the issues in this case and for all other relief proper in the premises.

I affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.



William E. Smith, President
Honey Creek Railroad, Inc.

II.

Complaint For Permanent Injunction

Comes now Honey Creek Railroad, Inc. by its President, William E. Smith, and for its Complaint For Permanent Injunction against Roberts, Roberts Pipeline and Roberts Construction would show as follows:

22. Honey Creek incorporates by reference rhetorical paragraphs 1 through 17 of the General Allegations and rhetorical paragraphs 19 through 21 of Legal Paragraph I of the Complaint.
23. A permanent injunction should be entered to enjoin Roberts, Roberts Pipeline and Roberts Construction from engaging in any future conduct to damage, destroy or in any way exercise unauthorized control over the property of Honey Creek's railroad.

WHEREFORE, Honey Creek prays for a permanent injunction against Roberts, Roberts Pipeline and Roberts Construction as requested herein and for all other relief proper in the premises.

I affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.



William E. Smith, President
Honey Creek Railroad, Inc.

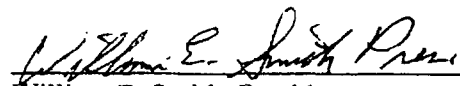
III.
Conversion

Comes now Honey Creek Railroad, Inc. by its President, William E. Smith, and for Legal Paragraph III of its complaint for conversion against Roberts, Roberts Pipeline and Roberts Construction would show as follows:

24. Honey Creek incorporates by reference rhetorical paragraphs 1 through 17 of the General Allegations as though fully set forth herein.
25. Roberts, Roberts Pipeline and Roberts Construction knowingly or intentionally removed and destroyed for his own gain property of Honey Creek resulting in a pecuniary loss to Honey Creek.
26. Roberts, Roberts Pipeline and Roberts Construction knowingly or intentionally exerted unauthorized control over the property of Honey Creek.
27. Defendants' actions constitute a violation of Ind. Code § 35-43-4-3.
28. As the direct result of defendants' actions and violation of I.C. § 35-43-4-3, Honey Creek has suffered a pecuniary loss which is in excess of One Hundred Thirty-one Thousand Dollars (\$131,000.00) and continues to increase due to the defendants' continued destruction of the railroad.
29. Honey Creek is entitled to recover all of the damages set forth in I.C. § 34-24-3-1 including, but not limited to, an amount up to three (3) times the actual damages, the costs of the action, reasonable attorney fees, actual expenses incurred in bringing this action and all other costs and damages set forth in said statute.

WHEREFORE, Honey Creek prays the Court or jury to grant judgment in favor of Honey Creek on its Complaint for Conversion for three (3) times the pecuniary loss suffered by Honey Creek; to grant Honey Creek the additional damages provided by statute; for reasonable attorney fees and expenses and for all other relief proper in the premises.

I affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.



William E. Smith, President
Honey Creek Railroad, Inc.

IV.
Mischief

Comes now Honey Creek Railroad, Inc. by its President, William E. Smith, and for Legal Paragraph IV of its complaint for mischief against Roberts, Roberts Pipeline and Roberts Construction would show as follows:

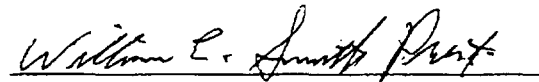
30. Honey Creek incorporates by reference rhetorical paragraphs 1 through 17 of the General Allegations as though fully set forth herein.
31. Roberts, Roberts Pipeline and Roberts Construction recklessly, knowingly, or intentionally damaged or defaced the property of Honey Creek without Honey Creek's consent.
32. The pecuniary loss is in excess of One Hundred Thirty-one Thousand Dollars (\$131,000.00).
33. Defendants' acts are a violation of Ind. Code § 35-43-1-2.
34. As the direct result of defendants' actions and violation of I.C. § 35-43-1-2, Honey Creek has suffered a pecuniary loss which is in excess of One Hundred Thirty-one Thousand Dollars

(\$131,000.00) and continues to increase due to defendants' continued destruction of the railroad.

35. Honey Creek is entitled to recover all of the damages set forth in I.C. § 34-24-3-1 including, but not limited to, an amount up to three (3) times the actual damages, the costs of the action, reasonable attorney fees, actual expenses incurred in bringing this action and all other costs and damages set forth in said statute.

WHEREFORE, Honey Creek prays the Court or jury to grant judgment in favor of Honey Creek on its Complaint for Conversion for three (3) times the pecuniary loss suffered by Honey Creek; to grant Honey Creek the additional damages provided by statute; for reasonable attorney fees and expenses and for all other relief proper in the premises.

I affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.



William E. Smith, President
Honey Creek Railroad, Inc.

V.

Damages

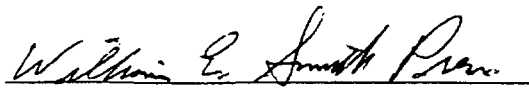
Comes now Honey Creek Railroad, Inc. by its President, William E. Smith, and for Legal Paragraph IV of its complaint for damages against Roberts, Roberts Pipeline and Roberts Construction would show as follows:

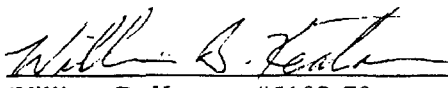
36. Honey Creek incorporates by reference rhetorical paragraphs 1 through 17 of the General Allegations as though fully set forth herein.

37. Roberts, Roberts Pipeline and Roberts Construction negligently and without authority damaged the railroad of Honey Creek.
38. Honey Creek demanded that Roberts, Roberts Pipeline and Roberts Construction cease and desist in their damage to Honey Creek's railroad, but they refused to do so and have sold or otherwise disposed of property owned by Honey Creek.
39. Honey Creek is without fault.
40. As the direct and proximate result of the negligent acts of the defendants, Honey Creek has been damaged. The amount of the damage has not yet been determined, but it is in excess of One Hundred Thirty-one Thousand Dollars (\$131,000.00).

WHEREFORE, Honey Creek prays the Court or jury to grant judgment in favor of Honey Creek on its Complaint for Damages; and for all other relief proper in the premises.

I affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.


William E. Smith, President
Honey Creek Railroad, Inc.


William B. Keaton, #5102-70
Attorney for Honey Creek Railroad, Inc.

KEATON AND KEATON, P.C.
126 West Second Street
Rushville, Indiana 46173
Telephone: (765)932-3947
Fax: (765) 938-2803

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was personally served upon the person or persons listed below or was served by facsimile transmission and/or by United States Mail, postage prepaid and addressed to the person or persons listed below:

Mr. John H. Brooke
Brooke & Mawhorr, P.C.
P. O. Box 1071
Muncie, Indiana 47308-1071

Dated: June 27, 2005.

By William B. Keaton
William B. Keaton

HoneyCreekAmendedCompli.jun

STATE OF INDIANA)
)SS: IN THE HENRY COUNTY CIRCUIT COURT
COUNTY OF HENRY) CIVIL DIVISION ROOM 3
) CAUSE NO: 33C01-0506-CT-0019

HONEY CREEK RAILROAD, INC.)
An Indiana Corporation,)
 Plaintiff,)
 Vs.)
GARY L. ROBERTS,)
 Individually,)
ROBERTS PIPELINE CONSTRUCTION)
COMPANY, INC.,)
An Indiana Corporation,)
ROBERTS CONSTRUCTION, INC.,)
An Indiana Corporation,)
 Defendants.)

DEFENDANTS' ANSWER TO AMENDED COMPLAINT

Comes now Defendant, Gary L. Roberts, Individually, (hereinafter referred to as "Roberts") by counsel, John H. Brooke, BROOKE MAWHORR, P.C., and for his Answer to Plaintiff's (hereinafter referred to as "Honey Creek") Complaint states as follows:

General Allegations

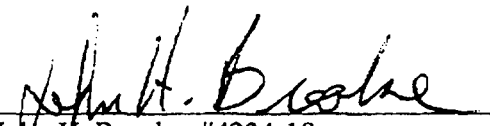
1. Roberts is without sufficient knowledge to either admit or deny the material allegations contained in Rhetorical Paragraph One of Honey Creek's Complaint.
2. Roberts is without sufficient knowledge to either admit or deny the material allegations contained in Rhetorical Paragraph Two of Honey Creek's Complaint.
3. Roberts is without sufficient knowledge to either admit or deny the material allegations contained in Rhetorical Paragraph Three of Honey Creek's Complaint.
4. Roberts would the material allegations of Rhetorical Paragraph Four of Honey Creek's Complaint.

5. Roberts is without sufficient knowledge to either admit or deny the material allegations contained in Rhetorical Paragraph Five of Honey Creek's Complaint.
6. Roberts would admit the material allegations contained in Rhetorical Paragraph Six of Honey Creek's Complaint.
7. Roberts would admit the material allegations contained in Rhetorical Paragraph Seven of Honey Creek's Complaint.
8. Roberts would admit the material allegations contained in Rhetorical Paragraph Eight of Honey Creek's Complaint.
9. Roberts would admit the material allegations contained in Rhetorical Paragraph Nine of Honey Creek's Complaint.
10. Roberts would admit the material allegations contained in Rhetorical Paragraph Ten of Honey Creek's Complaint.
11. Roberts would admit the material allegations contained in Rhetorical Paragraph Eleven of Honey Creek's Complaint.
12. Roberts would deny the material allegations contained in Rhetorical Paragraph Twelve of Honey Creek's Complaint.
13. Roberts would deny the material allegations contained in Rhetorical Paragraph Thirteen of Honey Creek's Complaint.
14. Roberts would deny the material allegations contained in Rhetorical Paragraph Fourteen of Honey Creek's Complaint.
15. Roberts is without sufficient knowledge to either admit or deny the material allegations contained in Rhetorical Paragraph Fifteen of Honey Creek's Complaint.

16. Roberts would deny the material allegations contained in Rhetorical Paragraph Sixteen of Honey Creek's Complaint.
17. Roberts would deny the material allegations contained in Rhetorical Paragraph Seventeen of Honey Creek's Complaint.

WHEREFORE, Defendant, by counsel, prays that Plaintiff take nothing by way of its Complaint.

Respectfully submitted,


John H. Brooke, #4234-18


Count I. Preliminary Injunction

Comes now Defendant, by counsel, and for his Answer to the allegations set forth in Count I of the Plaintiff's Complaint alleges and states:

18. Roberts hereby re-alleges and incorporates his answers to Rhetorical Paragraphs One through Seventeen of the General Allegations of the Plaintiff's Complaint as if those responses were fully set forth herein.
19. Roberts would deny the material allegations contained in Rhetorical Paragraph Nineteen of Honey Creek's Complaint.
20. Roberts would admit the material allegations contained in Rhetorical Paragraph Twenty of Honey Creek's Complaint.
21. Roberts would deny the material allegations contained in Rhetorical Paragraph Twenty-one of Honey Creek's Complaint.

WHEREFORE, Defendant, by counsel, prays that Plaintiff take nothing by way of its Complaint.

Respectfully submitted,


John H. Brooke, #4234-18

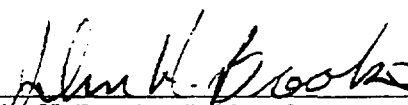
Count II. Permanent Injunction

Comes now Defendant, by counsel, and for his Answers to the allegations set forth in Count II of Plaintiff's Complaint, alleges and states:

22. Roberts hereby re-alleges and incorporates his responses to Rhetorical Paragraphs One through Twenty-one of Plaintiff's Complaint as if those responses were fully set forth herein.
23. Roberts would deny the material allegations contained in Rhetorical Paragraph 23 of Honey Creek's Complaint.

WHEREFORE, Defendant, by counsel, prays that Plaintiff take nothing by way of is Complaint.

Respectfully submitted,


John H. Brooke, #4234-18

Count III. Conversion

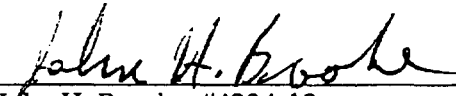
Comes now Defendant, by counsel, and for his Answers to the allegations set forth in Count III of the Plaintiff's Complaint alleges and states:

24. Roberts hereby re-alleges and incorporates his Answers to Rhetorical Paragraphs One through Twenty-three of the Plaintiff's Complaint as if those responses were fully set forth herein.

25. Roberts would deny the material allegations contained in Rhetorical Paragraph Twenty-five of Honey Creek's Complaint.
26. Roberts would deny the material allegations contained in Rhetorical Paragraph Twenty-six of Honey Creek's Complaint.
27. Roberts would deny the material allegations contained in Rhetorical Paragraph Twenty-seven of Honey Creek's Complaint.
28. Roberts is without sufficient knowledge to either admit or deny the material allegations contained in Rhetorical Paragraph Twenty-eight of Honey Creek's Complaint.
29. Roberts would deny the material allegations contained in Rhetorical Paragraph Twenty-nine of Honey Creek's Complaint.

WHEREFORE, Defendant, by counsel, prays that Plaintiff take nothing by way of its Complaint.

Respectfully submitted,


John H. Brooke, #4234-18

Count IV. Mischief

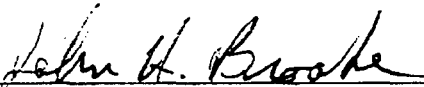
Comes now Defendant, by counsel, and for his Answers to the allegations set forth in Count IV of Plaintiff's Complaint, alleges and states:

30. Roberts hereby re-alleges and incorporates his responses to Rhetorical Paragraphs One through Twenty-nine of the Plaintiff's Complaint as if those responses were fully set forth herein.

31. Roberts would deny the material allegations contained in Rhetorical Paragraph Thirty-one of Honey Creek's Complaint.
32. Roberts would deny the material allegations contained in Rhetorical Paragraph Thirty-two of Honey Creek's Complaint.
33. Roberts would deny the material allegations contained in Rhetorical Paragraph Thirty-three of Honey Creek's Complaint.
34. Roberts would deny the material allegations contained in Rhetorical Paragraph Thirty-four of Honey Creek's Complaint.
35. Roberts would deny the material allegations contained in Rhetorical Paragraph Thirty-five of Honey Creek's Complaint.

WHEREFORE, Defendant, by counsel, prays that Plaintiff take nothing by way of its Complaint.

Respectfully submitted,


John H. Brooke, #4234-18

Count V. Damages

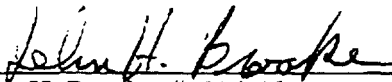
Comes now Defendant, by counsel, and for his Answers to the allegations set forth in Count V of the Plaintiff's Complaint alleges and states:

36. Roberts hereby re-alleges and incorporates his answers to Rhetorical Paragraphs One through Thirty-five of the Plaintiff's Complaint as if those responses were fully set forth herein.
37. Roberts would deny the material allegations contained in Rhetorical Paragraph Thirty-seven of Honey Creek's Complaint.

38. Roberts would deny the material allegations contained in Rhetorical Paragraph Thirty-eight of Honey Creek's Complaint.
39. Roberts would deny the material allegations contained in Rhetorical Paragraph Thirty-nine of Honey Creek's Complaint.
40. Roberts would deny the material allegations contained in Rhetorical Paragraph Forty of Honey Creek's Complaint.

WHEREFORE, Defendant, by counsel, prays that Plaintiff take nothing by way of its Complaint and for all other relief just and proper in the premises.

Respectfully submitted,


John H. Brooke, #4234-18

AFFIRMATIVE DEFENSES

Comes now Defendant, Gary L. Roberts, by counsel, John H. Brooke, BROOKE MAWHORR, P.C., and asserts the following affirmative defenses to the Plaintiff's Complaint:

FIRST AFFIRMATIVE DEFENSE

The Defendant would allege that the Plaintiff has failed to state a cause upon which relief could be granted.

SECOND AFFIRMATIVE DEFENSE

The Defendant would allege that the Plaintiff's injuries were caused in whole or in part by the negligence of the Plaintiff.

THIRD AFFIRMATIVE DEFENSE

The Defendant would allege that the Plaintiff's injuries were caused in whole or part by the actions of a non-party, that being the unknown individual or individuals who removed or altered other sections of the railroad which are not the subject of this action.

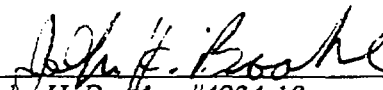
FOURTH AFFIRMATIVE DEFENSE

The Defendant would allege that the Plaintiff failed to mitigate its damages.

RESERVATION OF AFFIRMATIVE DEFENSES

The Defendant reserves the right to amend these Affirmative Defenses at the conclusion of discovery.

Respectfully submitted,


John H. Brooke, #4234-18
BROOKE MAWHORR, P.C.
112 East Gilbert Street
Muncie, IN 47308
(765) 741-1375

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing was served upon William B. Keaton, Attorney for Plaintiff, 126 West Second Street, Rushville, Indiana, 46173, on this 25th day of August, 2005, by U.S. Mail, postage prepaid.


John H. Brooke

STATE OF INDIANA) IN THE HENRY CIRCUIT COURT
)SS:
 COUNTY OF HENRY) CAUSE NO: 33C01-0506-CT-0019

HONEY CREEK RAILROAD, INC.,)
 An Indiana Corporation,)
 Plaintiff,)
 vs.)
 GARY L. ROBERTS,)
 Individually,)
 ROBERTS PIPELINE CONSTRUCTION)
 COMPANY, INC.,)
 An Indiana Corporation,)
 ROBERTS CONSTRUCTION, INC.,)
 An Indiana Corporation,)
 Defendants.)

**DEFENDANT'S RESPONSE TO PLAINTIFF'S PETITION
 FOR ORDER OF REFERRAL TO THE SURFACE TRANSPORTATION BOARD**

Come now, Defendants, Gary Roberts, Roberts Pipeline Construction Company, Inc., and Roberts Construction, Inc., ("Roberts") by counsel, John H. Brooke, BROOKE MAWHORR, P.C., and submit this Response to Plaintiff's Petition for Order of Referral to the Surface Transportation Board.

I. Introduction

Plaintiff, Honey Creek Railroad, Inc., ("HCR") filed its Complaint on June 22, 2005, in Henry County Circuit Court, New Castle, Indiana, followed by the filing of an Amended Complaint on June 27, 2005. HCR's Complaint sets forth counts for an emergency preliminary injunction, conversion of personal property belonging to HCR, malicious mischief, and a demand for damages.

Roberts filed his answer, asserting that, due to HCR's abandonment of the railroad corridor and track materials, any easement which may have been granted to HCR had reverted back to him as the landowner.

On October 28, 2005, HCR filed a Petition for Order of Referral for the Surface Transportation Board, which this Court set to be heard on February 8, 2006.

II. Statement of Facts

HCR filed a notice of exemption to abandon its entire line of railroad between Sulphur Springs and New Castle in Henry County, Indiana, on August 2, 2004. The Surface Transportation Board issued an order dated August 20, 2004, indicating that an exemption to abandon the railway would go into effect on September 21, 2004, unless requests for stays were received. STB Docket NO. AB-865-X, Honey Creek Railroad, Inc. Abandonment Exemption in Henry County, Indiana. A Request for Public Use Condition and Request for Interim Trail Use was filed by Indiana Trails Fund, Inc., which granted a one hundred eighty-day window for negotiations between that organization and HCR for the possible use of the railway for public recreation. That time period expired on March 20, 2005.

This railway has been unusable for approximately fifteen (15) years, as portions of track have been either paved over or removed. (See photos attached to this memorandum as exhibit 1.) HCR asserts unauthorized trespass of Roberts upon HCR property, and the unlawful taking, conversion and removal of railroad track materials from the property of HCR. Roberts asserts that the combination of HCR's notice of exemption to abandon its entire line of railroad, coupled with its constructive consent to removal or paving over of other portions of track, comprises abandonment as a matter of law, or in the alternative, constructive abandonment, thereby causing a vesting of the railroad's interest in Roberts, the owner of the rights-of-way at issue here, pursuant to I.C. §32-23-11-10.

III. Argument

The issues in this case should be decided in Indiana Court, pursuant to Indiana law. The Indiana Supreme Court decided issues very similar to the ones presented in the present case in *Conrail v. Lewellen*, 682 N.E. 2d 779 (Ind. Sup. Ct. 1997). In *Lewellen*, although the Interstate Commerce Commission (now Surface Transportation Board) had issued Conrail a certificate of abandonment prior to removal of tracks and other materials, the Court held that the Indiana Statute then in effect, Ind. Code 8-4-35-4 (current version at Ind. Code §32-23-11-6) which delineated when a railroad had abandoned its right-of-way, was determinative in this case, and awarded the rights-of-way to the owners, declaring Conrail to have abandoned the land as a matter of law. *Id* at 783.

HCR was issued the authority to abandon by the STB, subject to conditions which have, for the most part, expired. More importantly, HCR did nothing to prevent the paving over and/or removal of portions of its track by state and county authorities, rendering the entire track unusable for the past fifteen years. By consenting to this activity through lack of response, HCR has constructively abandoned any right of way interest it may have had at one time. Additionally, Roberts contends that Ind. Code § 32-23-11-6 (2) is satisfied because (1) the STB issued the necessary exemption, although conditional, and (2) rails, switches, ties, and other facilities were removed from the right-of-way years ago making it unusable for rail traffic.

The cases cited in Plaintiff's Legal Memorandum in Support of Petition for Order of Referral to the Surface Transportation Board for its proposition that this matter must be referred to the STB under the doctrine of primary jurisdiction as well as its exclusive

statutory jurisdiction over railroad abandonments were decided prior to the Indiana Supreme Court's 1997 decision in *Conrail v. Lewellen*. However, the Indiana Supreme Court did not find that any of the three factors (cited in *Pejepscot Industrial Park v. Maine Central R.R.Co.*, 215 F.3d 195, 205) relevant to whether the primary jurisdiction doctrine requires referral to the STB were present in *Lewellen*, nor are they present in this case. The issues presented in this case can be properly addressed by Indiana Courts.

IV. Conclusion

For the reasons set forth herein, Defendants, Gary Roberts, Roberts Pipeline Construction Company, Inc., and Roberts Construction, Inc., respectfully request that this Court deny Plaintiff's Petition for Order of Referral to the Surface Transportation Board and all other relief just and proper in the premises.

Respectfully submitted,

BROOKE MAWHORR, P.C.

By 

John H. Brooke, #4234-18

Attorney for Defendants

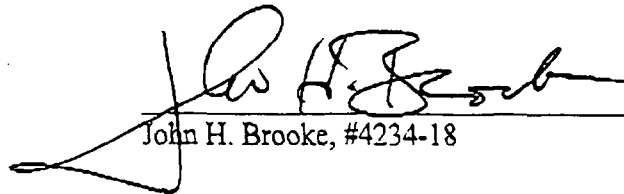
BROOKE MAWHORR, P.C.
112 East Gilbert Street
P.O. Box 1071
Muncie, IN 47308
(765) 741-1375

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing complaint was served upon those listed below via fax and/or first class mail, U.S. postage prepaid, on or before the date of filing.

William B. Keaton
KEATON AND KEATON, P.C.
126 West Second Street
Rushville, Indiana 46173

Mr. Richard R. Wilson
Richard R. Wilson, PC
127 Lexington Ave., Suite 100
Altoona, PA 16601



John H. Brooke, #4234-18

BROOKE • MAWHORR

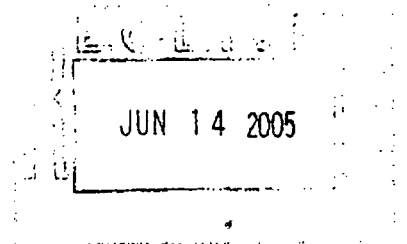
Attorneys At Law

John H. Brooke
Douglas K. Mawhorr

Leslie M. Horn

June 10, 2005

William Keaton
Keaton and Keaton, P. C.
126 West Second Street
Rushville, Indiana 46173



Re: Gary Roberts / Honey Creek Railroad

Dear Mr. Keaton:

I have had an opportunity to review your May 25, 2005 correspondence with my client. My client strongly disputes the allegations that he has removed, destroyed rails and rail equipment belonging to your client. In your letter dated May 25, 2005 you failed to identify the interest in the real estate where these rails are located other than describing it was a "right-of-way".

Since a preliminary search of the property records indicates no easement or other proper legal title for the Honey Creek Railroad or its predecessors, my client owns the real estate and owns all aspects of the real estate and improvements there on which have been abandoned. The Honey Creek rail line that crosses through my client's property was legally abandoned by the Surface Transportation Department of the United States Department of Transportation in August 2004. We have obtained the proper documentation from the Department of Transportation to verify the abandonment.

Furthermore the Norfolk and Southern Railroad has removed rails, ties and other aspects of the "Honey Creek Railroad property" making access to the Norfolk and Southern line impossible. My client puts no weight in the fact that the Honey Creek Railroad is "inactive" giving its legal and physical attributes which clearly indicate an abandonment.

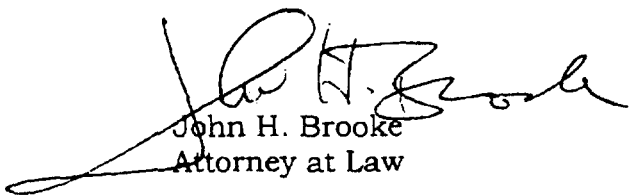
The Honey Creek Railroad has done nothing to operate its railroad for the past several years and there is no ability to operate the railroad in the future since it has been abandoned.

William Keaton
Keaton and Keaton, P. C.
Page Two
June 10, 2005

My client therefore has a right to use his property without interference from the Honey Creek Railroad. If there are any other questions please don't hesitate to contact me. Please be advised that this office will not accept service of process for any of the defendants herein.

Sincerely,

BROOKE ♦ MAWHORR, PC



John H. Brooke
Attorney at Law

JHB/llr

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of July, 2006 served a copy of the Petition of Honey Creek Railroad, Inc. for Declaratory Order - Reply of Honey Creek Railroad, Inc. to the Roberts Supplemental Petition for Further Extension of Time upon the following by first class United States Mail, postage prepaid:

William B. Keaton, Esq.
KEATON AND KEATON, P.C.
126 West Second Street
Rushville, IN 46173

John H. Brooke, Esq.
Brooke-Mawhorr Attorneys at Law
P.O. Box 1071
112 E. Gilbert Street
Muncie, Indiana 47308-1071

Kathleen Clubb Kauffman, Esq.
Ackerson Kaufmann Fex, PC
1250 H Street, NW
Ste. 850
Washington, DC 20005

A handwritten signature in black ink, appearing to read "Richard R. Wilson", written over a horizontal line.

Richard R. Wilson, Esq.
Attorney for Honey Creek Railroad, Inc.